

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

UNITED STATES OF AMERICA,

Case No.: 2:15-cr-00271-APG-GWF

Plaintiff

Order Denying Motion to Vacate

V.

(ECF No. 48)

BRANDON BLACK,

Defendant

Defendant Brandon Black pleaded guilty to one count of being a felon in possession of a
firearm in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2). He moves under 28 U.S.C. § 2255
to vacate his conviction and sentence. ECF No. 48. He argues that, based on the Supreme
Court's holding in *Rehaif v. United States*, 139 S. Ct. 2191 (2019), his indictment is fatally
flawed because the government failed to allege that he knew he was a felon when he possessed
the firearm or that he knew his convicted felon status barred him from possessing a firearm. He
contends that his due process rights were violated because the court did not advise him
during his plea proceedings that the government must prove that he knew these facts, so his plea
was not knowing and voluntary.

I deny Black's motion. The indictment is defective under *Rehaif* because it fails to allege Black knew he was a felon. But that defect did not deprive this court of jurisdiction. And I cannot show that he is actually prejudiced by that defect.

Background

When Black committed the instant offense, he already had three felony convictions. For each of those convictions, he was sentenced to more than a year in prison.

1 The indictment in the present case alleged that in September 2015, Black:

2 having been convicted of crimes punishable by imprisonment for a term exceeding one
 3 year . . . did knowingly possess a firearm . . . said possession being in and affecting
 4 interstate commerce and said firearms having been shipped and transported in interstate
 commerce, all in violation of Title 18, United States Code, Sections 922(g)(1) and
 924(a)(2).

5 ECF No. 10. In May 2017, Black pleaded guilty to the charge. ECF Nos. 40, 41. I sentenced
 6 him to a total of 50 months of imprisonment, to be followed by three years of supervised release.
 7 ECF No. 44. Black did not appeal his conviction or sentence. In June 2020, Black filed the
 8 current motion seeking to set aside his conviction and sentence based on *Rehaif*.

9 **Analysis**

10 Black was indicted in 2015, and pleaded guilty and was sentenced in 2017. At that time,
 11 under the law of this circuit and every other circuit, the government was neither required to
 12 allege in the indictment nor present evidence and prove at trial that the defendant knew of his
 13 status as a convicted felon. Later, the Supreme Court held “that in a prosecution under 18 U.S.C.
 14 § 922(g) and § 924(a)(2), the Government must prove both that the defendant knew he possessed
 15 a firearm and that he knew he belonged to the relevant category of persons barred from
 16 possessing a firearm.” *Rehaif*, 139 S. Ct. at 2200.¹

17 The indictment against Black did not allege that he knew he had been convicted of a
 18 crime punishable by more than one year of imprisonment. Because that allegation is missing,

19

20 ¹ “It is therefore the defendant’s *status*, and not his conduct alone, that makes the difference.
 21 Without knowledge of that status, the defendant may well lack the intent needed to make his
 22 behavior wrongful.” *Rehaif*, 139 S. Ct. at 2197 (emphasis original). I reject Black’s argument
 23 that, under *Rehaif*, the government must also prove that the defendant knew that he was barred
 from possessing a firearm. See *United States v Dillard*, No. 2:09-cr-00057-JAD-GWF, 2020 WL
 2199614, at *4 (D. Nev. May 6, 2020).

1 under *Rehaif* the indictment is defective. Black argues he is entitled to relief because this defect
 2 stripped this court of jurisdiction and because the defect violated his rights under the Fifth and
 3 Sixth Amendments. Neither of these theories warrants § 2255 relief.

4 This court “has jurisdiction of all crimes cognizable under the authority of the United
 5 States . . .” *Lamar v. United States*, 240 U.S. 60, 65 (1916). “The objection that the indictment
 6 does not charge a crime against the United States goes only to the merits of the case” and does
 7 not deprive the court of jurisdiction. *Id.*; *see also United States v. Cotton*, 535 U.S. 625, 630
 8 (2002) (citing *Lamar* for the proposition that “defects in an indictment do not deprive a court of
 9 its power to adjudicate a case.”). The Ninth Circuit has repeatedly cited *Cotton* for this principle.
 10 *See, e.g., U.S. v. Velasco-Medina*, 305 F.3d 839, 845 (9th Cir. 2002) (rejecting the argument that
 11 the indictment’s failure to allege the specific intent required for attempted reentry deprived the
 12 district court of jurisdiction). It applies even when considering appeals based on *Rehaif*. *See,*
 13 *e.g., United States v. Espinoza*, 816 F. App’x 82, 84 (9th Cir. 2020) (“[T]he indictment’s
 14 omission of the knowledge of status requirement did not deprive the district court of
 15 jurisdiction.”). This court had and has jurisdiction over Black’s case.

16 Because this § 2255 proceeding is Black’s first challenge to his indictment, he must show
 17 cause and actual prejudice.² “To challenge a conviction in a § 2255 proceeding based upon a
 18

19 ² Black is not entitled to automatic dismissal of the defective indictment because he did not
 20 challenge the indictment prior to pleading guilty. “[I]f properly challenged prior to trial,
 21 an indictment’s complete failure to recite an essential element of the charged offense is not a
 22 minor or technical flaw subject to harmless error analysis, but a fatal flaw requiring dismissal of
 23 the indictment.” *United States v. Du Bo*, 186 F.3d 1177, 1179 (9th Cir. 1999); *see also United*
States v. Qazi, 975 F.3d 989, 992 (9th Cir. 2020) (“If a defendant properly challenges an
 indictment before trial and, on de novo appellate review, we determine the indictment omitted an
 essential element, *Du Bo* requires automatic dismissal regardless of whether the omission
 prejudiced the defendant.”).

1 claim of error that could have been raised on direct appeal but was not, a defendant must
 2 demonstrate both cause to excuse the procedural default, as well as actual prejudice resulting
 3 from that error.” *United States v. Seng Chen Yong*, 926 F.3d 582, 590 (9th Cir. 2019). “‘Cause’
 4 is a legitimate excuse for the default; ‘prejudice’ is actual harm resulting from the alleged
 5 constitutional violation.” *Magby v. Wawrzaszek*, 741 F.2d 240, 244 (9th Cir. 1984).

6 For purposes of this motion only, I will assume Black can show cause to excuse the
 7 default. But Black has not and cannot show he is actually harmed by the defective indictment.

8 If Black’s conviction and indictment are set aside because of this defect, the government
 9 would be able to re-indict him to allege knowledge-of-status. “[T]he double jeopardy guarantee
 10 ‘imposes no limitations whatever upon the power to *retry* a defendant who has succeeded in
 11 getting his first conviction set aside’ (emphasis in original).” *United States v. DiFrancesco*, 449
 12 U.S. 117, 131, (1980) quoting *North Carolina v. Pearce*, 395 U.S. 711, 720 (1969). The only
 13 exception is when a conviction is reversed because of insufficiency of the evidence. Black has
 14 not challenged the sufficiency of the facts he admitted in his guilty plea.

15 I can consider the entire record to determine whether Black is being actually harmed by
 16 the defective indictment. In *United States v. Johnson*, the Ninth Circuit reviewed an appeal of a
 17 § 922(g) conviction based on *Rehaif*. 979 F.3d 632 (9th Cir. 2020). The defendant was convicted
 18 after a bench trial on stipulated facts that did not include his knowledge-of-status. The Ninth
 19 Circuit declined to dismiss the case and instead affirmed the conviction. The court determined
 20

21 Black is not entitled to a plain error review of his challenge to his indictment because he
 22 did not challenge it on appeal. An untimely challenge to an indictment is reviewed for plain
 23 error if it is raised for the first time on appeal. See *United States v. Velasco-Medina*, 305 F.3d
 839, 846 (9th Cir. 2002) (untimely challenge to an indictment on appeal reviewed for plain
 error); *United States v. Ross*, 206 F.3d 896, 899 (9th Cir. 2000) (same).

1 that Johnson's appeal was properly understood as asserting a trial error arising from the district
 2 court's omission of "the knowledge-of-status element now required under *Rehaif*."³ *Id.* at 636.
 3 Because Johnson had not timely objected to the district court's legal error, his claim was subject
 4 to plain error review. *Id.* As the challenge concerned a trial error rather than insufficient
 5 evidence, "retrial would be permitted even if he succeeded in establishing plain error on appeal."
 6 *Id.* at 637. And because retrial was available, the court was authorized to review the entire
 7 record on appeal, not just the record adduced at trial. *Id.* Reviewing for plain error, the court
 8 held that a retrial would result in another conviction because the defendant could not offer a
 9 plausible basis for a different outcome. *Id.* at 639.

10 [I]f the hypothetical retrial is certain to end in the same way as the first one, then
 11 refusing to correct an unpreserved error will, by definition, not result in a
 12 miscarriage of justice. Indeed, choosing to correct the error in those
 13 circumstances would produce the very sort of wasteful reversals that [Federal
 14 Rule of Criminal Procedure] 52(b) aims to avoid.

15 *Id.* at 637 (internal quotation and citation omitted).⁴ The record on appeal (including information
 16 in the Presentence Report) showed that Johnson had several prior felony convictions and had
 17 already served three prison sentences of over one year. "In light of the sentences imposed in his
 18 earlier cases, Johnson cannot plausibly argue that a jury . . . would find that he was unaware of
 19 his status as someone previously convicted of an offense punishable by more than a year in

20 ³ While Johnson framed his claim as challenging the sufficiency of the evidence, the Ninth
 21 Circuit re-framed his claim as he had not contested whether "the government introduced
 22 evidence sufficient to satisfy each of the elements required for conviction at the time of his trial."
Id. at 636.

23 ⁴ "As the Supreme Court has stated, Rule 52(b) authorizes courts to correct unpreserved errors,
 24 but that power is to be used sparingly, solely in those circumstances in which a miscarriage of
 25 justice would otherwise result." *Id.* at 636-37 (citations and internal quotation marks omitted).

1 prison.” *Id.* at 639. That evidence justified affirming the conviction even though the stipulated
 2 facts in the bench trial did not establish Johnson’s knowledge-of-status.

3 The *Johnson* court employed the plain error standard because the case arose on direct
 4 appeal and the defendant failed to object at trial. *Id.* at 636. Here, however, Black raises this
 5 issue in a § 2255 motion. The “cause and actual prejudice” standard for review of a § 2255
 6 motion is a significantly higher burden than the plain error standard on a direct appeal. *United*
 7 *States v. Frady*, 456 U.S. 152, 166-67 (1982) (“We reaffirm the well-settled principle that to
 8 obtain collateral relief a prisoner must clear a significantly higher hurdle than would exist on
 9 direct appeal.”).⁵ *Johnson* would require me to deny Black’s motion under a plain error review,
 10 so I likewise must deny the motion under the higher hurdle of the cause and prejudice standard.

11 As in *Johnson*, I can look to the entire record, including the Presentence Report, to
 12 determine whether Black can show actual prejudice from the defective indictment. *Johnson*, 979
 13 F.3d at 637. According to the Presentence Report, Black was convicted of three felony offenses
 14 and for each one he was sentenced to state prison for terms exceeding one year. Black offers no
 15 evidence or argument disputing this criminal history. He does not claim he was unaware that he
 16 had been convicted of a felony or that he had been given a prison sentence for a term exceeding
 17 one year. To the contrary, in his plea agreement he admits that “[a]t the time he possessed the
 18 aforementioned firearms, he had been convicted of a felony offense, that is, a crime punishable
 19 by more than a year in prison.” ECF No. 41 at 4. No plausible argument exists that, on these
 20 uncontested facts, a grand jury would not find probable cause to allege in the indictment that

21
 22 ⁵ Cf. *United States v. Timmreck*, 441 U.S. 780, 784 (1979) (“[T]he concern with finality served
 23 by the limitation on collateral attack has special force with respect to convictions based on guilty
 pleas.”).

1 Black knew of his status as a convicted felon. If I dismiss the indictment, he could be reindicted
2 and retried, and the result would be the same.

Again, I assume Black can show cause for failing to challenge his indictment on appeal.

4 While the indictment is defective because it lacks an allegation that Black knew he had been
5 convicted of a crime punishable by imprisonment for a term exceeding one year, the
6 overwhelming and uncontroverted evidence establishes that Black is not suffering actual
7 prejudice because of that defect under any of his theories. I therefore deny his § 2255 motion.

Certificate of Appealability

To appeal this order, Black must receive a certificate of appealability. 28 U.S.C.

10 § 2253(c)(1)(B); Fed. R. App. P. 22(b)(1); 9th Cir. R. 22-1(a). To obtain that certificate, he
11 “must make a substantial showing of the denial of a constitutional right, a demonstration that . . .
12 includes showing that reasonable jurists could debate whether (or, for that matter, agree that) the
13 petition should have been resolved in a different manner or that the issues presented were
14 adequate to deserve encouragement to proceed further.” *Slack v. McDaniel*, 529 U.S. 473, 483–
15 84 (2000) (quotation omitted). This standard is “lenient.” *Hayward v. Marshall*, 603 F.3d 546,
16 553 (9th Cir. 2010) (en banc).

I have denied Black’s motion based on the Ninth Circuit’s decision in *Johnson*. While *Johnson* employed the plain error standard of review, Black faces a “significantly higher hurdle” for his § 2255 motion. *Frady*, 456 U.S. at 166. The undisputed facts establish that Black is not prejudiced by the defective indictment because he could be reindicted and retried and the outcome would be the same. Although I have previously concluded in similar cases that reasonable jurists cannot debate that conclusion (and so denied certificates of appealability), the Supreme Court recently granted certiorari in two cases that may resolve some of the issues raised

1 in this case. See *United States v. Gary*, No. 20-444, 2021 WL 77245 (Jan. 8, 2021); *United States*
2 *v. Greer*, No. 19-8709, 2021 WL 77241 (Jan. 8, 2021). I therefore will grant Black's request for
3 a certificate of appealability.

4 I THEREFORE ORDER that defendant Brandon Black's motion under 28 U.S.C. § 2255
5 (**ECF No. 48**) is **DENIED**.

6 I FURTHER ORDER that Black is granted a certificate of appealability.

7 I FURTHER ORDER the Clerk of Court to enter a separate civil judgment denying
8 Black's § 2255 motion. The Clerk also shall file this order and the civil judgment in this case
9 and in the related civil case number 2:20-cv-1140-APG.

10 DATED this 11th day of March, 2021.



11 ANDREW P. GORDON
12 UNITED STATES DISTRICT JUDGE
13
14
15
16
17
18
19
20
21
22
23